

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEANDER WARD and DEPARTMENT OF THE NAVY,
BASE MOTOR TRANSPORT, Camp Lejeune, NC

*Docket No. 02-1831; Submitted on the Record;
Issued January 23, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective October 7, 2001.

On May 19, 1981 appellant, then a 31-year-old automobile mechanic, injured his back in the performance of duty while he was changing the transmission in a bus. The Office accepted the claim for a lumbosacral strain and a herniated disc at L4-5. Conditions not accepted as work related included preexisting spondylolysis at L5, spinal degenerative disc disease and intermittent hypertension. Appellant has not worked since the date of injury and has been receiving compensation for wage loss on the periodic rolls.

In a report dated August 28, 1987, Dr. Eugene W. Pate, an Office referral physician and orthopedic surgeon, noted that a magnetic resonance image (MRI) was recently obtained and revealed central bulging discs at L4-5 and L5-S1. He reported that appellant complained of recurrent back and leg pain. Dr. Pate opined that the bulging discs could have originated from an injury such as picking up a transmission, and that such a condition would have been aggravated by repetitive bending and lifting.

The record indicates that appellant was also involved in a nonwork-related motor vehicle accident on November 13, 1988, at which time he was also diagnosed with cervical and lumbar strains.

Appellant came under the care of Dr. Jeffrey L. Gross, a Board-certified orthopedist, who prepared biannual attending physician reports addressing appellant's chronic neck and back pain secondary to his herniated disc. He opined that appellant's cervical and lumbar strains, due to the nonwork-related motor vehicle accident of November 13, 1988, resolved by January 16, 1989. Dr. Gross recommended that appellant undergo a lumbar laminectomy but appellant declined surgery.

In a February 2, 2001 letter, the Office requested that Dr. Gross provide an updated report regarding the nature of appellant's back condition and whether he had any disability or continuing residuals causally related to his May 19, 1981 work injury.

In a March 5, 2001 report, Dr. Gross opined that appellant sustained a herniated disc with radiculopathy at L4-5 at the time of his work injury. He noted that appellant's current objective findings consisted of complaints of pain down the leg, and some evidence of bulging disc at L4-5, based on an April 9, 1992 x-ray report. Dr. Gross stated that appellant's herniated disc had not resolved, noting that 10 percent of herniated discs had continued symptoms despite treatment. He concluded that appellant could not stoop, bend or lift and was therefore incapable of his job as an automobile mechanic.

A functional capacity evaluation was performed on April 12, 2001, at which time appellant was noted as demonstrating symptom magnification. He was assessed as being able to perform only sedentary work given his self-limiting pain behavior.

An MRI taken of the lumbar spine on April 18, 2001 showed mild lateral stenosis at L2-3 and L4-5, degenerative disc disease and mild spinal stenosis at L4-5 and L5-S1 secondary to diffuse disc bulging and ligamentous hypertrophy. There was no evidence of disc herniation.

In a report dated April 4, 2001, Dr. Rudolph J. Maier, a Board-certified neurologist and Office referral physician, noted appellant's history of back injury in 1981. He described appellant's complaints of neck pain, back pain and occasional left shoulder and arm pain, along with frontal region headaches. He indicated that the most significant objective finding was some swelling over the left sacroiliac joint. Appellant was reported as exhibiting a lot of "pain behavior" making the examination difficult. It was Dr. Maier's opinion that appellant's original injury may have been a sacroiliac sprain rather than a lumbar sprain. He stated that "with the possible exception of the L5 sacrum, the facet joints of the spine work well." Dr. Maier considered appellant to be disabled so far as he considered himself to be disabled from work. The physician specifically stated, "There is little question from the examination that the patient has difficulty describing the pain in a consistent way and there [is] pain behavior and the patient has pretty well got the fixed idea that there [is] something quite wrong with him and he [will] never get better."

The Office also referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second opinion evaluation on April 3, 2001. In an April 20, 2001 report, Dr. Moore advised that, since his examination, appellant had obtained a lumbar MRI showing no evidence of a herniated disc. He noted appellant's history of injury, physical findings, symptoms and complaints of pain in the neck, shoulders and back. He also discussed the results of the functional capacity evaluation, noting that appellant's displayed self-limiting behaviors due to pain but that his complaints of pain were not supported by any objective evidence. There was a diagnosis of (1) chronic low back pain secondary to lumbar degenerative disc disease and (2) general deconditioning listed in the report. He specifically opined that appellant had no residuals due to his work-related injury of May 19, 1981. Dr. Moore also opined that appellant could perform only sedentary work and was limited to a lifting restriction of five to seven pounds, which would preclude him from performing the requirements of his date-of-injury job as

an automobile mechanic. He concluded, however, that appellant's work restrictions were due to degenerative disc disease and general deconditioning, not his work injury.

On August 7, 2001 the Office sent a list of questions to Dr. Maier asking that he clarify whether appellant had any residuals or disability causally related to the accepted work injury of lumbar sprain or herniated disc.

In a report dated August 16, 2001, Dr. Maier stated that there were no demonstrable residuals from the work injury. He reiterated that appellant could not work beyond the sedentary level because appellant did not want to work. He found no demonstrable explanation for appellant's continued complaints of pain and felt that there was symptom magnification.

On August 23, 2001 the Office issued a notice of proposed termination of compensation.

In a decision dated September 25, 2001, the Office terminated appellant's compensation effective October 7, 2001.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation effective October 7, 2001.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

In this case, the Office accepted that appellant sustained a lumbosacral strain and a herniated disc at L4-5 as a result of having to lift and change a transmission for a bus in the performance of duty on May 19, 1981. Appellant has been receiving wage-loss compensation based on the periodic reports of his treating physician, Dr. Gross, who found appellant to be totally disabled for his regular job as a mechanic due to ongoing back residuals due to the accepted work injury. He opined that appellant's herniated disc at L4-5 had not resolved since appellant continued to have back pain and there was x-ray evidence of a bulging disc at L4-5 remaining.

The Office sent appellant to two Board-certified specialists to ascertain whether appellant has any continuing residuals or disability due to his work injury. Dr. Maier examined appellant and opined that, from a neurological standpoint, appellant's pain seemed to be exaggerated. He opined that appellant had no residuals due to his herniated disc. Similarly, Dr. Moore noted that appellant had no evidence of a herniated disc on MRI testing. He opined that appellant's work injury has resolved and that appellant's continuing back symptoms are due to preexisting degenerative disc disease. The physician also opined that, while appellant could not return to his

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

regular job duties, he was capable of performing sedentary work. Appellant's work restrictions were attributed to degenerative disc disease and not any residuals of his work injury.

The Board finds that a conflict in medical opinion exists in the record between Dr. Gross and Drs. Maier and Moore. Section 8123(a) of the Federal Employees' Compensation Act provides that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.³ Inasmuch as a conflict exists in this record, the Board finds that Office has failed to carry its burden of proof in terminating appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated September 25, 2001 is hereby reversed.

Dated, Washington, DC
January 23, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³ *Marsha R. Tison*, 50 ECAB 535 (1999); *Richard L. Rhodes*, 50 ECAB 259 (1999).